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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-478

ABRAHAM E. FREEDMAN,

Petitioner,

v.

JAMES M. MORRISSEY, JOSEPH PADILLA and RALPH IBRAHIM, Individually and on Behalf of the Members of the NATIONAL MARITIME UNION OF AMERICA,

Respondents and Cross-Petitioners,

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL and LEON KARSCHMER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS JOSEPH CURRAN AND SHANNON WALL IN OPPOSITION TO THE CROSS PETITION FOR A WRIT OF CERTIORARI

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPRPME COURT OF THE UNITED STATES:

Respondents, Joseph Curran and Shannon Wall, respectfully pray that the cross-petitioner's application for

a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 18, 1973, be denied.

Opinions of the Courts Below:

The opinions of the Courts below are adequately set forth in the cross-petition at Page 2.

Jurisdiction:

The jurisdictional requisites are adequately set forth in the cross-petition at Page 2.

Questions Presented:

1. Whether the Supreme Court should grant certiorari to review the findings of fact of the District Court sitting without a jury, unanimously affirmed by the Circuit Court, which held that union officials were not personally responsible in damages for payments made to and by the trustees of an independent pension trust when the union has been made whole for such payments by the trustees, the union officials had no control over the manner and amounts of such payments by the trustees, and relied upon experienced counsel and trustees for the propriety of the payments?

2. Whether the Supreme Court should grant certiorari to review the findings of fact of the District Court sitting without a jury, unanimously affirmed by the Circuit Court, which held that a union is not barred *in futuro* from providing pensions for its employees when it has obtained approval for such pensions from the union membership in accordance with the union's constitution?

Statutes Involved:

The statutes involved are adequately set forth in the cross petition at Page 4.

Counter Statement of the Case:

Plaintiffs are members of the National Maritime Union of America (NMU). Defendants Curran and Wall are the President and Secretary-Treasurer, respectively, of the NMU. Defendants Karchmer, Segal and Freedman are Trustees of the NMU Officers' Pension Plan. Neither defendant Curran nor defendant Wall is a trustee of the Officers' Pension Plan. Defendant Perry is the former Assistant to the President of the NMU.

In 1952 the NMU, pursuant to a provision in its constitution which specifically authorized the establishing of a pension plan for its officers and employees, entered into a trust agreement establishing the NMU Officers' Pension Plan (A50-A61).* As originally adopted, the pension plan provided benefits only for officers of the Union. The plan was administered by three independent trustees appointed for life and not subject to control by the Union's officers (A53). This plan was approved by the Union's membership, which also approved the payments to be made by the Union to the trustees to fund the pension plan (251a-252a).

In 1961, and again in 1964, the pension plan was expanded to provide pension benefits for certain non-officer employees of the Union for whom no other provision for pension coverage had been made.

In May of 1968, plaintiffs served a demand upon the officers of the Union that they take action to recover from the trustees the amounts paid by the Union to provide pensions for non-officers (SA48). The basis of this demand was an amendment to the NMU Constitution adopted in 1960 which provided "All officers shall be eligible for benefits under the NMU Officers Pension Plan. . . ." Plaintiffs

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* References to Petitioner's appendix will be preceded by A. References to the cross-petitioner's supplemental appendix will be preceded by SA. References to the Joint Appendix filed in the Court of Appeals will be followed by a.

contended that this provision operated to limit the coverage of the pension plan to officers of the Union, and precluded its extension to staff employees of the Union.

In January of 1969, William Perry, who was employed as Assistant to the President of NMU, and was one of the non-officers covered under the NMU Officers' Pension Plan, was fired. At the time, Perry had a contract with the Union which guaranteed him employment through 1974. Pursuant to the provisions of that contract, a payment was made by the Union to the pension plan of the amount that would have been paid based on Perry's salary had he continued his employment through 1974, and Perry, in turn, was paid a pension by the trustees based on employment to the end of the contract period.

The instant suit was instituted in February of 1969. The District Court granted summary judgment to plaintiffs, holding that non-officers such as Perry could not be provided with pensions under the Officers' Pension Plan. The Court directed an accounting and the return by the trustees to the Union of all monies paid by the Union to provide pensions for non-officers (SA30-SA31).

The Union then amended its constitution to specifically authorize the inclusion of non-officers in the pension plan and validate the pensions previously paid to non-officers. Plaintiffs moved to have this amendment declared void as an exculpatory provision under Section 501(a) of the LMRDA. The District Court denied this motion (SA33-SA34). Defendants then appealed from the granting of summary judgment against them, and plaintiffs appealed the denial of their motion to declare the amendment exculpatory. The Court of Appeals for the Second Circuit affirmed the grant of summary judgment against defendants, but reversed the District Court's finding that the constitutional amendment was not exculpatory (SA13). The basis of the latter holding was that the amendment would have validated past pension payments (SA11).

On remand to the District Court an accounting was held and the amount which had been paid by the Union to the trustees to provide pensions for non-officers was determined (SA84-SA89). This amount, which with interest totalled $674,222.60, was immediately repaid by the trustees to the Union.

Plaintiffs then initiated a proceeding to surcharge the three trustees and defendants Curran and Wall for the amounts paid out by the trustees to non-officer beneficiaries of the pension plan, including defendant Perry. The District Court dismissed this claim in its entirety as against defendants Wall and Curran finding, first, that since all monies paid by the Union to the pension plan had been returned to the Union, there was no basis for surcharging defendant Union officers as the Union had suffered no loss, and secondly, with respect to the payment to Perry, that there was no evidence that defendant Curran directed or induced the payment to him, or even that he did so indirectly by seeking to impose pressure on any of the trustees (A15-16, A32-33). As to defendant Wall, the Court found that he had acted properly in all respects and did not play any part in either the payment by the Union to the Officers' Pension Plan of the payment based on the Perry contract, or in the payment by the trustees to Perry (A33-A34). These factual determinations were affirmed by the Court of Appeals as follows (A44):

> "Plaintiffs now argue that Curran dominated the trustees and it was through this power that the payment to Perry was made. This is properly a factual question for the district court which ruled on the basis of all the evidence presented that the plaintiffs failed to prove their contention. There is no reason for believing that the ruling of the district court on this question was clearly erroneous.
>
> "The district court held that the evidence established that Wall played no part in the events of Jan-

> uary 16th, and the payment to Perry. There is nothing in the record to indicate that this ruling is incorrect."

After the repayment by the trustees to the Union of the amount found to have been paid to fund pensions for non-officers, the Union deposited a portion of this amount in a separate interest-bearing account with the object of setting up a fund to provide pensions for its current employees who were not otherwise provided with pension coverage. This was consistent with the Court of Appeals prior decision that the amendment to the Union's constitution authorizing coverage of employees was invalid only because the amendment sought to validate retroactively past pension payments. The new pension program that was contemplated would cover only current employees and would not validate past pension payments. A trust agreement was drawn up but was never executed, and no payment was ever made to the contemplated trustee, Mr. Alvin Shapiro. Plaintiffs, however, contended that a payment had been made to Mr. Shapiro, which contention is factually incorrect. Petitioners further argue that it would be improper for the Union to provide pensions in any manner for non-officers of the Union because of the prior ruling that the amendment authorizing past employee pensions was exculpatory. The Court of Appeals rejected both these claims as follows (A44):

> "Plaintiffs' contentions fail for several reasons. First the Union never paid the money to Shapiro; the trust agreement was never executed. Even if the money had been paid, the proposed pension plan for current employees was for future payments. Consequently, the establishment of the fund was permissible and not prohibited by this Court's prior decision."

Petitioner now seeks review, *inter alia,* of the decision below which refused to surcharge respondents Curran and

Wall for the pension payments made by the trustees to defendant Perry and of the decision below which refused to enter judgment for the return of the $460,363 allegedly paid to Alvin Shapiro.

Reasons Why a Writ Should be Denied

I. The Factual Determinations of the District Court, Affirmed Unanimously by the Court of Appeals, that there was No Basis for Surcharging Defendants Curran and Wall is Amply Supported by the Evidence and Raises No Issue which would Warrant Review by This Court.

After numerous hearings in which it had ample opportunity to observe the witnesses, the District Court determined that there was no evidence that either Curran or Wall breached any fiduciary duty (A33, A34). This determination was affirmed unanimously by the Court of Appeals (A35-A45) and plaintiffs' Motion for Rehearing and for Rehearing in Banc was denied (SA45). Under these circumstances, the principle that this Court will not "undertake to review concurrent findings of fact by two courts below", *Graver Mfg. Co.*, v. *Linde Co.*, 336 U.S. 271, 275 (1949), is applicable and dictates denial of a Writ. However, even without this principle, there would be no grounds for granting a Writ in the instant case as the factual findings below were clearly and unequivocally correct.

There was no basis on which defendants Curran and Wall could possibly be held liable for payments made by the Union to the pension plan. First, all such payments have been returned to the Union with interest and, therefore, the Union has suffered no loss for which compensation might be required. Secondly, the evidence showed that all the payments made by the Union to the Trustees had been authorized by the Union's membership (251a-

252a). The basis on which these payments were determined to have been improper was an interpretation of the Union's Constitution on a point of such difficulty that Judges of the Court of Appeals themselves differed on it.* Under the circumstances, as the Court of Appeals found (A43), the defendant Union officers certainly were entitled to rely on the opinion of the Union's general counsel as to the propriety of the payments and could not be subject to surcharge for doing so.

With respect to the payments made by the Trustees to pensioners, including the payment to Perry, it is clear that, under the terms of the Trust Agreement, the Trustees acted independently, and defendants Curran and Wall had no authority to control their actions. Moreover, as both the District Court and the Court of Appeals found, there was no evidence that either Curran or Wall made any attempt to control the Trustees in the performance of their duties as trustees (A43-A44).

The basis on which the courts below surcharged defendant Freedman related to his rendering of a legal opinion. There was no evidence that defendants Wall or Curran had anything to do with this. On the contrary, the District Court specifically found as a fact that ". . . there is no evidence that on January 16th Curran directed the payment to Perry of $222,200 or directed Freedman to furnish such a legal opinion to the Trustees" (A33). On appeal, the Second Circuit affirmed, holding that there was no basis on which it could set aside this factual determination. The Court of Appeals stated (A44):

> "Plaintiffs now argue that Curran dominated the Trustees and it was through this power that the payment to Perry was made. This is properly a factual question for the district court which ruled on the basis of all the evidence presented that the plaintiffs failed

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* See Dissenting opinion of Judge Danaher in *Morrissey, et al. v. Curran, et al.*, F.2d (2nd Cir. 1970) (SA15-SA18).

> to prove their contention. There is no reason for believing that the ruling of the district court on this question was clearly erroneous."

As to defendant Wall, there was not even this slim vestige of an argument to support surcharging him. Rather, the evidence affirmatively showed that Wall knew nothing of the payment in December of 1968 by the Union to the Trustees of the balance due for contributions under the Perry contract, and Wall played no part whatsoever in the events of January 16, 1969 when Perry was fired. As to defendant Wall, the District Court found (A33-A44):

> "Wall, Secretary-Treasurer of NMU, knew that plaintiff had requested NMU to institute action to recover money contributed to the Officers Pension Plan with respect to non-officers. Indeed, he testified that he brought this to the attention of Curran and the NMU lawyers. However, the evidence establishes that he played no part either in the payment of $41,250.01 paid to the Officers Pension Plan on December 18, 1968 or in the events of January 16, 1969. Accordingly, there is no basis for finding that Wall breached his fiduciary duty under the LMRDA."

The Court of Appeals for the Second Circuit affirmed this finding, stating (A44):

> "The district court held that the evidence established that Wall played no part in the events of January 16th, and the payment to Perry. There is nothing in the record to indicate that this ruling is incorrect."

Nothing contained in the petition suggests any basis for rejecting the concurrent findings of the two lower courts. Rather, petitioners merely rehash their misinterpretations of the evidence which the courts below have unanimously rejected. There is not one iota of evidence of any "corrupt labor practices." Rather, the case turned on a close

question of law dealing with the interpretation of the Union's Constitution. The evidence affirmatively showed that all payments made by the Union to the Trustees had been specifically authorized by the Union's membership, and that the only basis on which these payments subsequently were determined to be invalid was in interpretation of the Union's Constitution on which the Judges of the Court of Appeals themselves disagreed. Neither defendants Curran or Wall, nor any of the defendant Trustees, appropriated any Union money to themselves. On the contrary, the basis on which one of the Trustees was surcharged was the Court's disagreement with his legal opinion, and the courts below both found that defendants Curran and Wall played no part in the rendering of this legal opinion.

These determinations by the courts below thus present no issue which would warrant review by this Court.

II. The Courts Below Correctly Rejected Plaintiffs' Contention that Curran and Wall Should Be Surcharged for Payments to Alvin Shapiro as Trustee because (1) No Payments Were Ever Made to Shapiro, (2) The Establishment of a Pension Plan for Current Employees of the Union Was Not Contrary to Any Court Order, and (3) The Proposed Pension Plan for Current Employees Had Been Specifically Approved by the Membership of the Union.

In the courts below, plaintiffs sought to have defendants Curran and Wall surcharged for the amount of $460,363 allegedly paid to one Alvin Shapiro as Trustee, and to enjoin the establishing of a trust to provide pension for certain non-officer employees of the Union. Plaintiffs claimed that the establishment of such a trust and the making of payments to the trust was in violation of the Court's prior order voiding the constitutional amendment which sought to validate the past pension payments. The court below rejected this claim for two reasons: first, no such payment had in fact been made, and, secondly, such pay-

ment and the establishment of the proposed trust would not have been in violation of the Court's order in any event (A44):

> "Plaintiffs' contentions fail for several reasons. First the union never paid the money to Shapiro; the trust agreement was never executed. Even if the money had been paid, the proposed pension plan for current employees was for future payments. Consequently, the establishment of the fund was permissible and not prohibited by this court's prior decision."

In their petition, plaintiffs argue that the Court's factual determination that no payment had been made to Mr. Shapiro was erroneous, and that Judge Hays should have considered other alleged facts which they claim would have required a different result. It is, of course, fundamental that this Court does not grant review merely to determine issues of fact, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), a principle which is particularly applicable to concurrent factual findings of two lower courts as in the instant case, *Graver Mfg. Co.* v. *Linde Co.*, *supra*. Morever, a review of the evidence demonstrates that the lower courts' factual determinations were manifestly correct.

The background of this aspect of the case is as follows: The Court of Appeals for the Second Circuit, in its initial opinion of February 20, 1970, held that the amendments to the NMU Constitution authorizing the inclusion of non-officers in the Officers Pension Plan were invalid exculpatory provisions because they would have validated past pension payments (SA11). The Court noted, however, that the amendments might not have been invalid "if the provisions were prospective only in their application" (SA11).

As a result of the exclusion of the non-officers from the Officers' Pension Plan, the Union found itself in a situation where many of its staff employees—including people

such as secretaries, maintenance supervisor, research director, controller—were left without any provision for pensions upon their retirement. Since the Court's decision recognized that establishing a pension program for these employees would be permissible so long as it was prospective and did not seek to validate past pension payments (SA11), the Union undertook to create a pension program which conformed to the Court's decision.

On February 2, 1972, the Trustees of the Officers Pension Plan repaid to the Union the sum of $674,222.60 constituting the amount, with interest, that they had received to provide pensions for non-officers. The Union then deposited $460,363 of this amount in a separate interest-bearing bank account *under the control of the Union* (55a-56a). This was the amount that was estimated to be needed to fund the pensions for *current* employees. A trust agreement was drafted naming Alvin Shapiro as trustee, but this agreement was never executed and no monies were ever paid to Mr. Shapiro (55a-56a).

The officers of the NMU then submitted to the membership of the Union for their approval or disapproval the proposed pension program for non-officers. This was done in May of 1972. A memorandum describing the proposed action was prepared, distributed to all offices of the Union and read at all membership meetings in May of 1972. This memorandum provided, in part:

> "The proposed pension program will not validate any pensions previously paid or which have been determined by the Court to have been improperly paid. Rather, the proposed plan is intended only to cover those current employees who are presently without pension coverage." (58a)

This proposal for an employee pension plan received overwhelming approval from the Union's membership

(55a-56a). However, despite this membership approval, the proposed Trust Agreement was not put into effect at that time, and no payment was made to Mr. Shapiro. The funds still are within the control of the Union. Petitioner's statement, in their Petition, that defendant Wall testified that the monies have been paid out is not correct. Wall never so testified.

Since no monies were ever paid to Mr. Shapiro, there could be no basis on which a judgment could be entered directing the return of what was never paid, nor could a judgment be entered against defendants Curran and Wall for payments that were not made. This fact, by itself, was sufficient to require dismissal of this aspect of plaintiffs' claim. However, since plaintiffs seek to create the impression that defendants tried to evade the Court's order, it is also important to recognize, as the Court below held (A44), that the proposed pension plan for non-officer employees is not in any sense a violation of the prior order of the Court of Appeals. Rather, it is plaintiffs, not defendants Curran and Wall, who are misapplying the Court of Appeals' prior decision. Plaintiffs are seeking to interpret the decision that the 1969 amendments were exculpatory as precluding the Union from *ever* providing pensions for its employees, even prospectively, notwithstanding the fact that the membership of the Union authorized such pensions. Nothing in the Court of Appeals' initial decision remotely suggests that the Union was to be barred for all time into the future from providing pensions for its employees. On the contrary, all that was objected to was the validation of past pension payments (SA11), and this the Union is not seeking to do.

Section 501 of the LMRDA never was intended to interfere with the orderly conduct of a Union's business; rather, its concern was that actions of Union officials be properly authorized. Here the required authorization was obtained not once, but several times. There has been no attempt to evade the Court's order; rather, a careful effort to comply

with it and still fulfill the responsibility which the Union has as an employer to its own employees. Thus, the court below clearly was correct in its conclusion that the establishment of a pension plan for current employees was not prohibited by the Court's prior decision, and this determination presents no issue which would warrant review by this Court.

Conclusion:

It must be emphasized that there is no issue of union corruption in this case, nor any misappropriation of union funds to the personal profit of Curran and Wall or defendant trustees. Regrettably, plaintiffs, in their cross-petition have sought to substitute unsupported and scurrilous charges for facts and the truth. These malicious charges are false and without foundation. The case originally turned on an interpretation of the Union's constitution on a close question on which the Court of Appeals panel which heard the case itself disagreed. The subsequent surcharge of one of the trustees related solely to a legal opinion which he rendered. There was no finding of personal dishonesty by any of defendants.

The District Court found, and was affirmed unanimously by the Court of Appeals, that neither Curran nor Wall breached their fiduciary duties under the LMRDA. These findings are amply supported by the evidence and present no issue which would warrant review by this Court.

Respectfully submitted,

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